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IN THE
COURT OF APPEALS OF INDIANA

ROBERT ACHTERBERCH,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0603-CV-137
	)	
JANICE CLARK,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0408-CT-169

December 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Robert Achterberch, the plaintiff below, appeals following a jury trial in which the jury returned a verdict in favor of Janice Clark, the defendant below, thereby denying him damages for personal injuries he sustained when Clark's car struck him. Achterberch raises two issues on appeal, but we find the following issue dispositive: whether the trial court properly instructed the jury on the doctrine of sudden emergency.[1] Concluding that the evidence does not support this instruction, and that the error was not harmless, we reverse.

Facts and Procedural History

On the evening of May 2, 2004, Achterberch was working for a company responsible for towing motor vehicles that became disabled within the construction areas of Interstate 80/94 in Lake County, Indiana. Achterberch and his supervisor were both parked in a cut-off area that connected the interstate to 177th Street, which runs parallel to the interstate. 177th Street is a residential street, and has trees, bushes, and other foliage on both sides of it. Around 7:30 p.m., Achterberch left his vehicle to use the bathroom at a nearby building on the opposite side of 177th Street. It was still light outside, and Achterberch was wearing a reflective vest. When returning to his vehicle, Achterberch approached 177th Street, looked to the left and the right, and saw no cars approaching. He then entered the street and again looked to the left, this time seeing Clark's car roughly two feet away from him. Achterberch was hit by the passenger's side of Clark's car, and sustained injuries.

[1] Achterberch also argues that the trial court abused its discretion in denying his motion to modify the instruction to make it applicable to both Clark and Achterberch. Because we hold that the evidence does not support the instruction, we need not address this argument.

Clark testified that she was driving approximately twenty-five to thirty miles per hour, but another witness's testimony indicated Clark might have been going up to fifty-five miles per hour. Clark testified that she did not see Achterberch before the accident, but that a "split-second" before the accident, "something caught [her] on the right of [her] eye and [she] instinctively just went left." Transcript at 292.

Achterberch filed suit, alleging that Clark's negligence caused the accident. After the jury heard the evidence, Clark requested a jury instruction on the "sudden emergency" doctrine.[2] The trial court granted the request, over Achterberch's objection, and read the following instruction to the jury:

> When a person is confronted with a sudden emergency not of the person's own making, without sufficient time to determine with certainty the best course to pursue, that person is not held to the same accuracy of judgment as would be required of him if he had time for deliberation. Accordingly, if the person exercises such care as an ordinarily prudent person would exercise when confronted with a sudden emergency, he is not negligent.
>
> In this case, if you find from the evidence that the Defendant was confronted with a sudden emergency and that the Defendant then pursued a course of action that an ordinarily prudent person would have pursued when confronted with the same or similar emergency, then you may not assess negligence to the Defendant.

Tr. at 355.

The jury returned a verdict finding Achterberch sixty-eight percent at fault and

[2] We note that although previous case law had described sudden emergency as an affirmative defense, our supreme court has recently clarified that although the proponent of the sudden emergency defense has the burden of proof for this defense, the doctrine is not an affirmative defense within the meaning of Indiana Trial Rule 8(C), and therefore, the failure to raise sudden emergency in pleadings does not bar the trial court from giving the instruction. Willis v. Westerfield, 839 N.E.2d 1179,1186 (Ind. 2006).

Clark thirty-two percent at fault. Under Indiana's comparative fault statute,[3] Achterberch took nothing by way of his complaint because he was found more at fault than Clark. Achterberch now appeals.

Discussion and Decision

I. Standard of Review

We review the trial court's decision to give an instruction for an abuse of discretion. Lovings v. Clary, 799 N.E.2d 76, 78 (Ind. Ct. App. 2003), trans. denied. A party has the right to have the jury hear an instruction on that party's theory of the claim or defense. Collins v. Rambo, 831 N.E.2d 241, 245 (Ind. Ct. App. 2005). The trial court should give a proposed instruction if it is: (1) a correct statement of the law; (2) applicable to the evidence introduced at trial; and (3) relevant to the issues the jury must decide in reaching its verdict. Lovings, 799 N.E.2d at 78. Even if we find that the trial court abused its discretion in giving an instruction, we will not reverse if we determine that the error was harmless. Lashbrooks v. Schultz, 793 N.E.2d 1211, 1214 (Ind. Ct. App. 2003), cert. dismissed. An erroneously given instruction will be considered harmless unless it affects the substantial rights of the party objecting to the instruction. Lovings, 799 N.E.2d at 79. When making this determination, we will not view the improper instruction in isolation, but will look at the instructions as a whole. See Aldana v. Sch. of City of East Chicago, 769 N.E.2d 1201, 1211 (Ind. Ct. App. 2002), trans. denied.

[3] Ind. Code § 34-51-2-6 ("claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages").

II. Sudden Emergency Instruction

Achterberch argues that the trial court erred in giving the instruction because the evidence did not support the instruction. We agree.

The doctrine of sudden emergency recognizes that a person faced with sudden and unexpected situations in which he or she must act immediately "is not expected to exercise the judgment of one acting under normal circumstances." Willis, 839 N.E.2d at 1184. When confronted with a sudden emergency, one has "'no time for adequate thought, or is reasonably so disturbed or excited that the actor cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess.'" Id. (quoting W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 33 at 196 (5th ed. 1984)). The doctrine "does not excuse fault, but rather defines the conduct to be expected of a prudent person in an emergency situation." City of Terre Haute v. Simpson, 746 N.E.2d 359, 367 (Ind. Ct. App. 2001), trans. denied.

In order to be entitled to an instruction on sudden emergency, a party must demonstrate three conditions. First, the party's own negligence must not have created or brought about the emergency. Willis, 839 N.E.2d at 1184. Second, the imminence of the emergency must leave the party no time for deliberation. Id. Third, the party's apprehension of the emergency must itself be reasonable. Id. at 1184-85.

Achterberch argues, "Clark failed entirely to apprehend the danger caused by 'something' in the roadway she caught in the corner of her eye." Appellant's Brief at 20. We agree, and hold that sufficient evidence does not exist to satisfy the second necessary condition. The requirement that the defendant be left with no time for deliberation, "of

course, includes the necessity of the actor perceiving the emergency." Collins, 831 N.E.2d at 246 (quoting Lovely v. Keele, 166 Ind. App. 106, 109, 333 N.E.2d 866, 868 (1975)). The second prong of the test also corresponds to the rationale of the sudden emergency doctrine that "recognizes that the sudden emergency robs the actor of the time to thoughtfully reflect or deliberate among various choices." Id. at 248 (emphasis in original). If the actor faced no choice or had no alternatives, the rationale for the sudden emergency disappears, and an instruction should not be given. Id.; see Lashbrooks, 793 N.E.2d at 1213-14 (quoting cases from other jurisdictions that stand for the proposition that the sudden emergency doctrine requires that the actor make some sort of choice between courses of action).

In Collins, the defendant was driving behind the plaintiff, who suddenly stopped after a third vehicle cut in front of the plaintiff. The defendant had not seen the third vehicle, but saw only the plaintiff's vehicle come to an abrupt stop. The defendant applied her breaks, but was unable to stop before hitting the plaintiff's vehicle. We held that the sudden emergency doctrine did not apply because the defendant "did not make a 'choice,' among several options, that in hindsight was not as prudent as a different choice," citing the lack of evidence that the defendant could have done something else to avoid the accident had she had more time to consider. Collins, 831 N.E.2d at 248. Instead, "[t]he short distance between [the defendant's] car and [the plaintiff's car] as well as her speed foreclosed any other option besides reflexively slamming on the brakes." Id.

Here, Clark testified that she did not see Achterberch at all before the accident, and then that she saw something "in the corner of [her] eye," a "split-second" before the impact and "instinctively just went left." Tr. at 292. As in Collins, there was no evidence

introduced that, after Clark saw this "something," she should or could have pursued any other course that would have avoided the accident. Indeed, the evidence tends to indicate that Clark was not aware of the emergency at all, made no real choice, and jerked her car to the left based on pure instinct. While practically every accident involves some sort of emergency, the doctrine of sudden emergency applies only in certain situations; this case does not involve such a situation. See Lashbrooks, 793 N.E.2d at 1214.

The error in giving the instruction becomes even more apparent considering the theory of the case. Although a party is entitled to have the judge instruct the jury on the party's theory of the case, Collins, 831 N.E.2d at 245, the sudden emergency doctrine is relevant to neither Achterberch's theory of Clark's fault nor Clark's defense. "The doctrine of sudden emergency deals with potentially negligent conduct of an actor after an emergency arose." Frito-Lay v. Cloud, 569 N.E.2d 983, 987 (Ind. Ct. App. 1991) (emphasis added). Here, Achterberch does not argue that Clark was negligent after the emergency arose when Clark saw Achterberch in the road. Instead, Achterberch's theory of negligence is that Clark's negligent driving prior to seeing Achterberch in the road made it impossible for her to stop or otherwise avoid the accident. Correspondingly, Clark does not argue that she made a decision after perceiving the sudden emergency that was reasonable based on the lack of time for deliberations. Instead, her theory is that she did not see Achterberch in time to make any decision at all. Although Clark has the right to a jury instruction on any applicable defense, based on the evidence, the defense of sudden emergency is neither applicable nor relevant.

Having concluded that the evidence does not support the sudden emergency instruction, we now must decide whether giving the instruction affected Achterberch's

substantial rights and therefore was not merely harmless error. We will conclude that an instruction affected a party's substantial rights if "it appears that the jury's verdict could have been predicated upon such an instruction." Lashbrooks, 793 N.E.2d at 1214 (quoting Antclift v. Datzman, 436 N.E.2d 114, 122 (Ind. Ct. App. 1982)). We conclude that based on the misleading nature of the sudden emergency instruction itself, and the failure of the instructions as a whole to clarify the applicability of the doctrine, the jury's verdict could have been predicated on the improper instruction.

First, the language used by the trial court in the sudden emergency instruction has the danger of confusing the jury. Cf. Lueder v. N. Ind. Pub. Serv. Co., 683 N.E.2d 1340, 1346 (Ind. Ct. App. 1997), trans. denied, (finding reversible error where jury instruction "serves only to confuse the jury"). The burden was on Clark to establish the existence and elements of a sudden emergency. Willis, 839 N.E.2d at 1185. However, the trial court's instruction fails to allocate the burden of proof to Clark, and instead contains no mention of the burden or standard of proof. [4] This failure to allocate the burden of proof to Clark is especially critical in this case, because Achterberch's theory of fault was that Clark's negligence placed

[4] Although we agree with Clark that the trial court's instruction may have been based on the pattern instruction, we find the instruction given by the trial court differs significantly from the pattern jury instruction:

> [Name of plaintiff/defendant] claims [he] [she] was not negligent because [he] [she] acted with reasonable care in an emergency situation. [Name of plaintiff/defendant] was not negligent if [he] [she] proves the following by a preponderance of the evidence:
>
> 1. [He] [She] was confronted with a sudden emergency;
> 2. The emergency was not of [his] [her] own making;
> 3. [He] [She] did not have sufficient time to deliberate; and
> 4. [He] [She] exercised such care as an ordinarily prudent person would exercise when confronted with a similar emergency, even if it appears later that a different course of action would have been safer.

Ind. Pattern Jury Instruction No. 5.33 (emphasis added).

her in the situation of being unable to avoid the accident. Cf. Stepanek v. Durbin, 640 N.E.2d 429, 431 (Ind. Ct. App. 1994), trans. denied (holding that the trial court's failure to give an instruction that would have informed the jury of a statute that could have shifted the burden of proof to the defendant was not harmless because "[o]bviously, a plaintiff deprived of a burden shifting instruction is harmed"). Although Achterberch bore the burden of establishing Clark's negligence, the trial court's instruction improperly failed to instruct the jury that Clark bore the burden of establishing the elements of the sudden emergency defense. Therefore, the instruction created the danger that the jury could have applied the doctrine without finding that Clark had established its elements by a preponderance of the evidence.

Also, although the trial court's instruction begins by indicating that the sudden emergency must not be of Clark's making, the instruction goes on to inform the jury that if it finds "the Defendant was confronted with a sudden emergency and that the Defendant then pursued a course of action that an ordinarily prudent person would have pursued when confronted with the same or similar emergency, then you may not assess negligence to the Defendant." Tr. at 355. In addition to failing to indicate that the burden was on Clark to justify her course of action, this instruction "completely disregards the alleged negligence that occurred before" Clark saw Achterberch in the street. Collins, 831 N.E.2d at 250. In this case, Achterberch's entire theory of negligence was based on Clark's alleged negligent driving before Clark saw Achterberch in the street. The jury easily could have been misled or confused by this inapplicable instruction, and therefore we cannot say that the error in giving the instruction was harmless. See id.

The remainder of the trial court's instructions did not clarify the sudden emergency doctrine for the jury. In Aldana, we held that an erroneously given sudden emergency instruction[5] was harmless when additional instructions given by the trial court: (1) properly allocated the burden of proving the sudden emergency to the defendant; (2) clarified that "[a] sudden emergency does not relieve a motorist of his duty to maintain a proper lookout while operating a vehicle as a reasonably prudent person would do in the same or similar circumstances"; and (3) instructed that "[a] motorist on the highway has a duty to maintain his automobile under reasonable control." 769 N.E.2d at 1211. Here, on the other hand, the trial court gave neither an instruction clarifying that the sudden emergency doctrine was not available to Clark unless she demonstrated by a preponderance of the evidence that her negligence did not cause the sudden emergency, nor an instruction that clarified that even if the jury found a sudden emergency existed, Clark still had a duty to act as a reasonable motorist before the emergency arose. Again, the trial court's failure to clarify that the sudden emergency doctrine does not protect any negligence on the part of Clark that occurred before the emergency is critical given Achterberch's theory of fault.

Clark argues that this instruction could not have had an effect on the jury's decision because the jury allocated thirty-two percent of the fault to Clark. We disagree. The doctrine of sudden emergency does not excuse fault, and "a person may be found negligent if his actions are deemed unreasonable, despite the emergency." Willis, 839 N.E.2d at 1186. Here,

[5] We held that the instruction in Aldana was properly given, but went on to hold that even if the instruction was improper, any error would have been harmless based on our review of the instructions as a whole. 769 N.E.2d at 1211.

the jury could have relied on the sudden emergency instruction, but still found that Clark acted unreasonably despite the emergency and allocated some percent of the fault to her. Cf. Compton v. Pletch, 561 N.E.2d 803, 807 (Ind. Ct. App. 1990), opinion adopted by, 580 N.E.2d 664, 664 (Ind. 1991) ("The sudden emergency instruction informs the jury . . . how it is to allocate fault and apportion damages when the conduct of the person in question is that of an 'ordinarily prudent person' when faced with an emergency situation."). The fact that the jury allocated some fault to Clark does not preclude the possibility that it also relied upon or was confused by the sudden emergency instruction.

We hold that based on the confusing nature of the instruction and the lack of clarification in the remainder of the instructions, Achterberch's substantial rights were affected by the sudden emergency instruction. Therefore the error in giving the instruction was not harmless and we must reverse for a new trial.

Conclusion

We hold that the trial court abused its discretion in reading the jury an instruction on sudden emergency. We further hold that this error affected Achterberch's substantial rights and therefore was not harmless.

Reversed.

BARNES, J., concurs.

SULLIVAN, J., concurs with separate opinion.

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ROBERT ACHTERBERCH,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0603-CV-137
	)	
JANICE CLARK,	)	
	)	
Appellee-Defendant.	)	

SULLIVAN, Judge, concurring

I agree that the giving of the sudden emergency instruction was erroneous. I do not do so, however, based upon the conclusion that the sudden emergency doctrine is inapplicable unless the person relying upon the doctrine had "various choices" as to a course of conduct after the emergency was discovered. Slip op. at 6 (quoting Collins v. Rambo, 831 N.E.2d 241, 248 (Ind. Ct. App. 2005)). This premise requires "that the actor make some sort of choice between courses of action." Id.

The implication of such analysis is that under circumstances in which a sudden emergency instruction is problematic because the actor did not make a choice of alternatives, the actor may necessarily be held to have been negligent. I respectfully disagree.

Here, the majority correctly, I believe, observes that Rambo's own negligent conduct

in following too closely created the emergency.[6] This fact, alone, rendered the sudden emergency doctrine inapplicable.

If it were otherwise, however, and if Rambo's conduct had not been negligent but Collins's vehicle nevertheless came to a sudden and unexpected stop, leaving Rambo no choice of alternatives except to slam on her own brakes, I would opine that the doctrine of sudden emergency might well have been in play.[7]

Even if we must accept the "alternative choices" prerequisite for application of "sudden emergency," that does not mean that a collision following an instantaneous and instinctive reaction to a perceived emergency without time to choose an arguably better course of action automatically gives rise to a determination that the actor was negligent. In this light, the following statement from Lashbrooks v. Schultz, 793 N.E.2d 1211, 1213 (Ind. Ct. App. 2003) would seem to provide some insight:

> "If one is unable to act or fail to act, then one cannot be negligent." (Original emphasis).

Whether we describe the concept as "sudden emergency" or as something else, the fact remains that an actor should be able to have the jury instructed that what may constitute unreasonable and negligent conduct in one scenario may be reasonable conduct in another fact situation. Notwithstanding my observations with respect to the requirement that various

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[6] In this regard, it is important to note that in Collins, it was the stopping of the Collins's car which was the "sudden emergency" as to Rambo. It was the "interfering van" which was the "sudden emergency" as to Collins and which caused Collins to suddenly brake.

[7] I would acknowledge that a trier of fact might well conclude that a particular actor under the circumstances did indeed have ample time for deliberation and a choice of alternatives which would not have resulted in a collision. Yet I also believe that a different trier of fact might conclude that the defendant had no realistic opportunity to do other than react instinctively to a perceived emergency. In

choices between or among courses of action must exist for application of the doctrine of sudden emergency, I concur in all other aspects of the majority decision.

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the latter instance, I do not think it appropriate to say that the actor should be held negligent.